Opinion
No. 1198

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

TAX DIVISION

W. BELL & CO., INC. :

Petitioner :

v. :

DISTRICT OF COLUMBIA :

Respondent :

Docket No. 2474

O R D E R

The District of Columbia taxed W. Bell & Co. Inc. (hereinafter Bell) on all of the catalogs which it sent into the District of Columbia pursuant to D. C. Code 47-2702 (1973). Bell paid the tax, conceding the propriety of the tax on the catalogs which were retained in its D. C. retail sales outlet but contesting the validity of the tax on the catalogs which were sent directly to potential customers in the District of Columbia. This case comes before the Court upon Bell's petition for a refund of the taxes paid on the catalogs which it sent to D. C. residents.

The facts of this case are not in dispute. Bell, a District of Columbia Corporation, purchases its catalogs from a printer in Georgia. These catalogs are printed, packaged, and addressed in Georgia at the direction of Bell's main office which is located in Rockville, Maryland. Thereafter, the catalogs which are bound for D. C. residents and shipped by common carrier to the District of Columbia where they are mailed to potential customers in the District by the employees of the common carrier. The potential customers do not pay any money for these catalogs; Bell sends them to the customers free of charge.

Discussion

The District of Columbia Compensating-Use Tax states:

> "There is hereby imposed and there should be paid by every vendor engaged in business in the District and by every purchaser a tax on the use, storage, or consumption of any tangible personal property and service sold or purchased at retail." D. C. Code §47-2702 (1973).

In plainer language, there are two situations which traditionally trigger the imposition of the use tax. First, an out-of-state seller is required to pay a use tax on goods sold to state residents if it can be shown that the seller's business has sufficient contact with the state to uphold the taxing power of the state. National Geographic Society v. California Board of Equalization, 430 U. S. 551, 97 S. Ct. 1386 (1977). Second, a resident purchaser or a vendor engaged in business in the state is required to pay a tax on the use, storage, or consumption of goods and services purchased at retail. See D. C. Code 47-2702 (1973). The Court will review the facts of this case with those two approaches in mind.

* * * * *

Usually, when an out-of-state seller is taxed on goods sold to resident purchasers, he collects a sum of money from each of the purchasers and then pays that money to the taxing state. One of the primary reasons for this type of tax is set forth in National Geographic Society, supra:

> "All states that impose sales taxes also impose a corollary use tax on property brought out of state to protect sales tax revenues and put local retailers subject to the sales tax on a competitive parity with out-of-state retailers exempt from the sales tax."

However, before an out-of-state seller may be constitutionally required to collect from purchasers and pay a use tax, it must be shown that there is a sufficient nexus between the seller and the taxing state to support the imposition of a tax. Id. The power of the state to tax must be balanced against the protection afforded by the Commerce Clause of the United States Constitution. For example, in Nelson v. Sears, Roebuck & Co., 312 U. S. 359, 362, 61 S. Ct. 586, 587 (1941), Sears "refused to collect the tax on mail orders sent by Iowa purchasers to its out-of-state branches and filled by direct shipment through the mails or a common carrier from those branches to the purchasers." However, because Sears maintained retail outlets in Iowa, the Court concluded that Sears had a sufficient nexus to Iowa to uphold the imposition of the tax. Iowa's tax was held constitutionally permissible and consistent with the Commerce Clause. In National Bellas Hess, Inc. v. Illinois Revenue Department, 386 U. S. 753, 87 S. Ct. 1389 (1967) the Court invalidated a tax under facts identical to the facts in Sears except for one item. National Bellas Hess did not maintain a local retail outlet in Illinois. Apparently, the presence of a retail outlet is enough of a nexus to substantiate a tax on the sale of goods by out-of-state sellers to resident buyers.

Under the facts of the instant case, the catalogs are the goods which the District of Columbia is seeking to tax under its Compensating Use statute. Bell, a District of Columia Corporation, does not sell those catalogs to District residents. The only sale in this entire set of facts is between the printer in Georgia and Bell. Therefore, under the use tax analysis discussed above, Bell could not be taxed. The other

way that a use tax may be imposed is if it can be determined that Bell, the purchaser of the catalogs, uses, stores, or comsumes the catalogs in the District of Columbia. It does not matter whether the catalogs were purchased within or outside the District.

These catalogs are printed and addressed in Georgia, shipped to the District by common carrier and mailed by the employees of the common carrier to District of Columbia residents. The District of Columbia does not argue nor does the Court find that there is any evidence that the catalogs were either stored or consumed by Bell. The District of Columbia argues that Bell "uses" these catalogs in the District of Columbia. The Court is not persuaded by this argument because of the dictates of the Commerce Clause and based upon the Court's interpretation of the language in the D. C. Compensating Use statute.

The Commerce Clause bars states from unduly burdening interstate commerce by taxing goods which are moving along the stream of interstate commerce. See, Hughes Bros. Timber Co. v. Minnesota, 272 U. S. 469, 47 S. Ct. 170 (1926); Minnesota v. Blasius, 290 U. S. 517, 6 S. Ct. 475 (1886). These catalogs enter the stream of interstate commerce in Georgia when the printer loads them into the trucks, already labeled and addressed. Their journey from printer to D. C. residents is uninterrupted except for a change in transportation from common carrier to the United States mail. This is not enough of a break for these catalogs to lose the protection of the Commerce Clause. Id.

In Service Merchandise Company, Inc. v. Tidwell, 592 S.W. 2d 215 (1975), the Service Merchandise Company, Inc.

a Tennessee Corporation, sent catalogs and other printed materials to its customers in Tennessee in a manner similar to the method employed by Bell. The Service Merchandise Company had its materials printed in Minnesota, shipped to Tennessee, and then mailed to the regional post office in Tennessee to potential customers in Tennessee. The state taxed this activity and the Supreme Court of Tennessee invalidated this tax.

> ". . .the temporary interruption in the interstate transit of the printed material in this case was solely for the purpose of promoting the continuing movement of the printed material in its journey to its ultimate recipients. . ."

The Tennessee Court then concluded that the state could not tax these materials because they were within the stream of commerce and protected by the Commerce Clause of the United States Constitution. The facts of the instant case correspond directly to the facts of the Tennessee case, and the Court agrees with the analysis of the Supreme Court of Tennessee.

... These catalogs are merely a means of communication between Bell and the potential customers. This case is different from Sears, supra, where the Court upheld a tax on goods purchased by residents from out-of-state sellers who maintained an in-state retail outlet. These catalogs are not sold by Bell. Therefore, the Court holds that the District of Columbia unconstitutionally burdens interstate commerce by taxing catalogs which are sent to D. C. residents free of charge and which travel through interstate commerce from printer to potential customers.

Another reason why the Court must strike down this particular tax as applied to these facts is based upon the Court's interpretation of the statute. These catalogs are a means of communication between Bell and its potential customers.[1/] Bell purchased a communication service from the printer. Moreover, Bell purchased a transportation service from the common carrier who transported these catalogs to Washington and then mailed them. D. C. Code 47-4701(1)(b) states:

> "The term 'retail sale', 'sale at retail', and 'sold at retail' shall not include the following:
>
> (1) sales of transportation and communication services."

Therefore, the Court holds that D. C. Code 47-2702 does not apply to the "sale" of the catalogs by the printer to Bell when the catalogs were clearly intended solely as a means of communication.

Judgment is entered in favor of the petitioner, Bell, with respect to that portion of the tax levied upon the catalogs which were sent free of charge to D. C. residents.

The Court hereby ORDERS that this portion of the tax, plus interest, shall be refunded to Bell.

1/ The Court distinguishes these catalogs from the catalogs in Bell's retail outlet in D.C. There, the catalogs have left the stream of commerce and are so closely related to the everyday business activities of Bell that it is clear that Bell exercises dominion and control over them and that their purpose is not merely for communication.

The Court further ORDERS counsel to submit proposed orders which compute the appropriate interest rate and the dollar amount of the tax, plus interest, within 20 days of receipt of this Order.

WILLIAM C. PRYOR
Judge

July 11, 1979

Copies to: Jay W. Freedman, Esquire
Freedman, Levy, Kroll & Simonds
1730 K Street, N.W.
Washington, D.C. 20006

Richard Amato, Esquire
Assistant Corporation Counsel, D.C.
District Building
Washington, D.C. 20004

Mr. Kenneth Back
Finance Officer, D.C.

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